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DIVISION II

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STATE OF WASHINGTON

BY    
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No. 49667-4-II

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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MONICA ANAYA,

Respondent,

v.

ERNST MEINHART and CHRISTINE MEINHART,

Appellants.

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**APPELLANTS' OPENING BRIEF**

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## **I. INTRODUCTION**

This lawsuit involves claims for auto accident injuries sustained by two plaintiffs.<sup>1</sup> This is an appeal from a jury incurred verdict which awarded each plaintiff, Ernst and Christine Meinhart, virtually 100% of their injury treatment expenses during a 7 month recovery period, but which verdict awarded neither plaintiff compensation for their pain and suffering.<sup>2</sup>

This appeal is based in law upon CR 59(a)(1), (5), (7), and (9); and upon *Palmer v. Jensen*, 937 P.2d 597, 132 Wash. 2d 193 (1997); and *Fahndrich v. Williams*, 194 P.3d 1005, 147 Wash. App. 302 (Ct. App. 2008).

## **II. ASSIGNMENTS OF ERROR**

The trial court abused its discretion when it denied Ernst and Christine Meinhart's motion for a new trial.<sup>3</sup>

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1) Did the evidence substantiate that Ernst Meinhart experienced pain and suffering as a result of the motor vehicle accident October 23, 2013?
- 2) In accordance with CR59(a)(1), (5), (7), and (9), and the rulings of the Washington Supreme Court in *Palmer v. Jensen*, 937 P.2d 597, 132 Wash. 2d 193 (1997); and Division II Court of Appeals in

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<sup>1</sup> CP 1-3

<sup>2</sup> CP 35; Exhibit 8, 9, 10, and 11

<sup>3</sup> CP 114 – 115

*Fahndrich v. Williams*, 194 P.3d 1005, 147 Wash. App. 302 (Ct. App. 2008), did the trial court abuse its discretion in denying Ernst Meinhart a new trial?

- 3) Did the evidence substantiate that Christine Meinhart experienced pain and suffering as a result of the motor vehicle accident October 23, 2013?
- 4) In accordance with CR59(a)(1), (5), (7), and (9), and the rulings of the Washington Supreme Court in *Palmer v. Jensen*, 937 P.2d 597, 132 Wash. 2d 193 (1997); and Division II Court of Appeals in *Fahndrich v. Williams*, 194 P.3d 1005, 147 Wash. App. 302 (Ct. App. 2008), did the trial court abuse its discretion in denying Christine Meinhart a new trial?

#### **IV. STATEMENT OF THE CASE**

##### **A. FACTS**

##### **1. ACCIDENT FACTS**

On October 23, 2013, Ernst and Christine Meinhart, in their 60s, were returning to their home in northeast Tacoma in their small pick-up when they slowed and stopped to yield to approaching traffic from their left. At the time they had been traveling southbound on 21<sup>st</sup> Avenue SW and intending to go westbound on SW 356<sup>th</sup> St, which was a controlled intersection on the border of Federal Way and northeast Tacoma. It had a separate, designated right turn lane with a posted, yield sign. Ernst and

Christine Meinhart were both looking to the left when they were struck from behind.<sup>4</sup>

The force of the impact was so severe that it bent the steel bumper of the Meinhart's pick-up truck, as seen in Exhibits 2 and 3. The impact was described by Ernst as a major jolt;<sup>5</sup> and by Christine as being like a bulldozer hit their vehicle.<sup>6</sup>

The jury was instructed that liability was admitted,<sup>7</sup> and it was so stated by defense counsel in closing argument, "Liability is not an issue, that's been admitted, you heard that in the instructions."<sup>8</sup>

## 2. PAIN AND SUFFERING FACTS

### i. Oral Testimony

Ernst Meinhart testified he felt severe pain in his back and neck when he woke up the day following the accident.<sup>9</sup> Ernst testified that he waited a few days before attempting to contact a doctor, but when his pain did not improve he did so with Dr. Finlayson who had seen Christine several

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<sup>4</sup> RP Vol. I, Pg. 28 Lines 7- Pg 29 Line 2 (Testimony includes reference to Exhibit 1)

<sup>5</sup> RP Vol. I, Pg. 29 Line 17

<sup>6</sup> RP Vol. II, Pg. 121 Line 14

<sup>7</sup> CP 24 – 25

<sup>8</sup> RP Vol. III, Pg. 15 Lines 2-3

<sup>9</sup> RP Vol. I, Pg. 31 Lines 17-19

years before, although he himself had never previously had neck or back problems.<sup>10</sup> He testified that the pain was primarily in his neck and lower back and definitely between moderate and high such that he used hot and cold packs to get through the day, and that his symptoms decreased in intensity over the course of several months even though he did not make 100% recovery.<sup>11</sup>

Christine Meinhart testified that she first began to notice the onset of pain shortly after the accident including a pounding headache.<sup>12</sup> Christine testified that her symptoms were in her upper back and parts of her lower back and that the pain was moderate to severe initially and dissipated with the passage of time, continuing through the course of her treatment with Dr. Finlayson and June 6, 2014 when she was discharged from further care.<sup>13</sup>

Dr. Donald Finlayson testified that with respect to Christine Meinhart he diagnosed sprain and strain injuries to the neck, mid back and low back with segmental dysfunction or subluxation with finding of neck

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<sup>10</sup> RP Vol. I, Pg. 31 Line 20 to Pg. 32 Line 18

<sup>11</sup> RP Vol. I, Pg. 35 Line 8 to Pg. 36 Line 21

<sup>12</sup> RP Vol. II, Pg. 121 Lines 16-20

<sup>13</sup> RP Vol. II, Pg. 125 Line 24 to Pg. 126 Line 16



pain, mid back pain, low back pain and sacroiliac joint pain together with headaches and that he quantified the pain and discomfort in a setting of moderate to severe.<sup>14</sup> He testified that she made steady progress from the date of the accident down through June 6, 2014, when he discharged her as having reached maximum medical improvement.<sup>15</sup> He further testified that on June 6, 2014 she was still complaining of mild pain in her neck and back and that her pain levels were lower because she was improving, but that she had plateaued so she was released to return on an as needed basis at that point.<sup>16</sup>

With respect to Ernst Meinhart, Dr. Finlayson testified that he had never treated Ernst before seeing him on October 30, 2013.<sup>17</sup> Dr. Finlayson testified that Ernst Meinhart had moderate to severe pain in his his neck, mid back and low back, as well as his sacroiliac joints and that he had headaches that Dr. Finlayson placed in the moderate category.<sup>18</sup> Dr. Finlayson testified that Ernst was making progress subjectively and objectively pain-wise and that Ernst had improved such that Dr. Finlayson

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<sup>14</sup> RP Vol. II, Pg. 14 Line 11 to Pg. 16 Line 6

<sup>15</sup> RP Vol. II, Pg. 18 Lines 12 - 23

<sup>16</sup> RP Vol. II, Pg. 21 Lines 12 to Pg. 22 Lines 13

<sup>17</sup> RP Vol. II, Pg. 25 Lines 19 to Pg. 26 Line 5

<sup>18</sup> RP Vol. II, Pg. 26 Line 19 to Pg. 27 Line 14

felt that Ernst's progress was good enough to discharge him on an as needed basis on June 6, 2014.<sup>19</sup>

The defense doctor, Dr. Marc Sutton, admitted that both Ernst and Christine were each injured in the subject accident.<sup>20</sup> He testified that Ernst had initial findings of mild to moderate strain type of injury to his neck, middle back and lower back.<sup>21</sup> He testified that in his opinion Christine had from mild to moderate exacerbation of her neck to upper back and mild to moderate strain of her lower back.<sup>22</sup> Dr. Sutton further opined that each of the Meinharts had each reached maximum medical improvement by March 5, 2014, and that treatment thereafter was not necessary, although he did not say it was unreasonable.<sup>23</sup>

With respect to Ernst Meinhart, the defense doctor, Sutton, testified during the defense's **direct examination** in part as follows:

(RP Vol. II, Pg. 95 Lines 16-23)

“Q Doctor, do you have an opinion on a reasonable degree of chiropractic probability as to what injuries Mr. Meinhart sustained in the accident on October 23, 2013?

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<sup>19</sup> RP Vol. II, Pg. 27 Line 15 to Pg. 28 Line 21

<sup>20</sup> RP Vol. II, Pg. 111 Lines 19-21

<sup>21</sup> RP Vol. II, Pg. 95 Lines 16-23

<sup>22</sup> RP Vol. II, Pg. 101 Lines 9-19

<sup>23</sup> RP Vol. II, Pg. 112 Lines 3-20

A Yes. His initial findings were mild to moderate. He showed recovery from those injuries in a manner that I would expect. So I think his condition was consistent with a mild to moderate strain type of injury of his neck, middle back, and lower back.”

(RP Vol. II, Pg. 86 Lines 8-11)

“Q What injuries did Mr. Meinhart complain of when he first saw the chiropractor October 30th, 2013?

A He had complaints of neck, middle back, lower back pain, I believe pelvic pain, and some headache.”

(RP Vol. II, Pg. 88 Line 2)

“Q And what treatment do you believe would have been reasonable and necessary on a more probable than not basis based upon chiropractic probability for Mr. Meinhart after the accident and before March of 2014?

A....I came up with 24 chiropractic treatments, I think six therapy exercise sessions, and two massage therapy treatments.”

Similarly, with respect to Christine Meinhart, the defense doctor, Sutton, testified during the defense’s **direct examination**:

(RP Vol. II, Pg. 97 Lines 9-13)

“Q What injuries did Ms. Meinhart complain of when she first saw the chiropractor on October 30th, 2013, based upon your review of her chiropractic records?

A She had complained of headaches, neck and upper back pain, lower back pain.”

(RP Vol. II, Pg.101 Lines 9-19)

“Q What injuries do you believe on a more probable than not basis based upon chiropractic probability that Ms. Meinhart sustained in the accident on October 23, 2013?

A Well, she had the preexisting neck and upper back problems, according to the records, was my impression. Her findings at the time, by the chiropractor, were mild to moderate, similar to her husband's. So it was my opinion that she had a mild to moderate exacerbation, which is a temporary worsening of her osteoarthritic condition, and that she also had a mild to moderate strain of her lower back."

(RP Vol. II, Pg. 102 Line 22 to Pg. 103 Line 12)

"Q What treatment do you believe would have been reasonable and necessary for Mrs. Meinhart to have as a consequence of the October 30<sup>th</sup> (sic), 2013 accident, on a more probable than not basis?

A ....[i]t was my opinion that 26 chiropractic treatments was reasonable, eight therapeutic exercise sessions would have been helpful for her, and three massage therapy sessions."

With respect to the defense doctor's testimony during **cross examination** note the following:

(RP Vol. II, Pg. 104 Lines 10 – 13)

"Q You've given the jury the impression that in your opinion the injuries sustained were mild to moderate sprain and strain in October of 2013, is that correct?

A That's correct."

(RP Vol. II, Pg. 111 Lines 19 – 21)

"Q Now, you're not disagreeing that either Ernst or Christine were injured in the accident?

A Correct."

4) In **closing argument** defense counsel stated to the jury:

(RP Vol. III, Pg. 15 Lines 6-9)

“Dr. Sutton has testified that both Mr. and Mrs. Meinhart sustained soft tissue injuries to their necks and their backs. And there's no contest, we're not contesting the fact they had injuries.”

(RP Vol. III, Pg. 15 Lines 20-24)

“Now, initially, Mr. and Mrs. Meinhart's complaints were about a six to a seven, and we know by the time that they were done with their treatment they were anywhere from a zero to three. You will see that in their records.”

(RP Vol. III Pg. 16 Line 19 to Pg. 17 Line 5)

“Now, you've got seven months that you have to figure out how to compensate them for their damages for the pain and suffering for that period of time. You'll recall that Ms. Meinhart testified yesterday that by the time she left on June 6th of 2014, that she was pretty much better. She said she's had three occasions since then that she's had problems. So, obviously, the last month would not be worth as much as the first month when you try to figure out how to put a number on what to compensate them for pain and suffering.”

## ii. Documentary Evidence

In addition to the oral testimony of Ernst and Christine Meinhart and that of their treating doctor Finlayson; and in addition to the testimony of the defense doctor and argument of the defense counsel admitting injury; as well as the fact that the treatment was reasonable and necessary through March 5, 2014, the plaintiffs submitted documentary evidence further establishing their injuries. Exhibits 2 and 3 demonstrated vehicular damage

sufficient to bend the rear bumper of the Meinhart pick-up, which was not bent before the accident.<sup>24</sup>

Far more significant and substantive proof confirming pain and suffering by both Mr. and Mrs. Meinhart is established in their treatment records during the period of 7 months from October 30, 2013 through June 6, 2014. Exhibit 4 contains approximately 181 pages of the records of Ernst Meinhart; and Exhibit 5 contains approximately 127 pages of the records of Christine Meinhart (for treatment commencing October 30, 2013), all of which describe in detail the symptoms, and the treatment thereof, of each of them. Those records are comprised of symptom questionnaires of the patients, daily clinic notes recording symptoms and treatment, and periodic reports also addressing symptoms and treatment throughout the time period of October 30, 2013 through June 6, 2014.

Those exhibits were admitted evidence that the jury was duty bound to consider by the court's instruction.<sup>25</sup> Without reciting every page, it is noteworthy that, for example, on October 30, 2013, Ernst Meinhart described pain in the neck which caused him to wake up in the middle of night; and that there was moderate to severe pain on palpation of his

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<sup>24</sup> RP Vol. I, Pg. 30 Lines 1-11

<sup>25</sup> CP 18, 19 and 20

cervical spine,<sup>26</sup> moderate pain on palpation at the T1-4 spinous processes, moderate pain on palpation of the lumbar region, and that there were visible restrictions and/or asymmetries of his spinal regions in the physical examination.<sup>27</sup> Later, on November 15, 2013, in a daily note Mr. Meinhart was reported as having moderate pain in his neck, thoracic, lumbar, and sacroiliac joints, and headaches getting better since last visit.<sup>28</sup> Still further in a daily note of December 13, 2013, he reported that he had not had a headache since his last prior treatment, but was suffering more discomfort in his mid and low back.<sup>29</sup> In his final evaluation of June 6, 2014, it was recorded that his cervical thoracic and lumbar pain were much lower, often in the “mild pain” level.<sup>30</sup>

In the October 30, 2013 entry, it was recorded that she suffered neck, upper/middle and lower back pain and headaches with problems dressing, reading, standing, walking, lifting, sitting, driving and exercising, and that she would wake up in the middle of the night because of the pain in her neck

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<sup>26</sup> Exhibit 4 (M-000157)

<sup>27</sup> Exhibit 4 (M-000158)

<sup>28</sup> Exhibit 4 (M-000141)

<sup>29</sup> Exhibit 4 (M-000120)

<sup>30</sup> Located in Exhibit 4, and identified as a June 6, 2014 evaluation consisting of 10 pages not bates-stamped, but found between (M-000048 – M-000049)

and upper mid back.<sup>31</sup> As an additional example of pain it was recorded in the December 11, 2013 evaluation report she was continuing to have neck, mid back, and lumbar back pain, but that she felt that she was making a steady improvement since she started treatment.<sup>32</sup> On January 24, 2014, she complained of her neck pain limiting the time she could work at the computer at which time she was reported as having mild neck, thoracic, and lumbar pain, although her headaches were getting better.<sup>33</sup> On February 26, 2014, she stated neck and upper back pain being better today and no headache.<sup>34</sup> On March 5, 2014, she described herself as getting better with improvements in all of the involved spinal regions.<sup>35</sup> The June 6, 2014 report recorded that she was still having problems with activities like standing, walking, sitting, lifting driving and sleeping, but not as badly as before.<sup>36</sup>

#### B. PROCEDURE

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<sup>31</sup> Exhibit 5 (M-000286)

<sup>32</sup> Exhibit 5 (M-000255)

<sup>33</sup> Exhibit 5 (M-000232)

<sup>34</sup> Exhibit 5 (M-000207)

<sup>35</sup> Exhibit 5 (M-000197)

<sup>36</sup> Exhibit 5 (M-000171)



The plaintiffs timely filed a motion for additur and/or a new trial which was argued, but denied, on September 1, 2016.

## **V. SUMMARY OF ARGUMENT**

CR 59 provides for a new trial, reconsideration and amendments of judgments as follows:

- (a)(1) “Irregularity in the proceedings of the...jury...by which such party was prevented from having a fair trial”;
- (5) “Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been result of passion or prejudice”;
- (7) “That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law”;
- (9) “That substantial justice has not been done”.

The Washington Supreme Court has made it very clear that it is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence. The Supreme Court decided in *Palmer v. Jensen*, 132 Wash.2d 193, 203, 937, P.2d 597 (1997).

“The medical evidence substantiates Pamela Palmer’s claim that she experienced pain and suffering for over two years after the accident. We hold the jury’s verdict providing no damages for Palmer’s pain and suffering contrary to the evidence. The trial court therefore abused its discretion when it denied Palmer’s motion for a new trial.”

The Supreme Court’s reasoning in *Palmer* is found in the following passage *Id.* at 201:

“Although there is no per se rule that general damages must be awarded to every plaintiff who sustains an injury, a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages. The adequacy of a verdict, therefore, turns on the evidence. *See Hills v. King*, 66 Wash. 2d 738, 404 P.2d 997 (1965) (no abuse of discretion to grant new trial where jury awarded nothing for pain and suffering but plaintiff experienced pain for at least 17 months after the accident); *Shaw v. Browning*, 59 Wash.2d 133, 367 P.2d 17 (1961) (where “indisputable” that plaintiff sustained pain and suffering and jury failed to award general damages, new trial upheld); *Idle v. Stoltenow*, 47 Wash.2d 847, 850, 289 P.2d 1007 (1955) (no abuse of discretion to grant new trial where verdict of less than \$500 for general damages was “so inadequate as to shock the conscience of the court”); *Cleva v. Jackson*, 74 Wash.2d 462, 445 P.2d 322 (1968) (new trial upheld where trial court found nominal amount for pain and suffering “clearly was unjustified under the evidence introduced at the time of trial”).

11 ½ years later Division II of the Court of Appeals followed the dictate of the *Palmer* decision in *Fahndrich v. Williams*, 194 P.3d 1005, 147 Wash. App. 302, 309 (Ct. App. 2008).

“As in *Palmer*, *Fahndrich* is entitled to a new trial because the jury found that the accident caused injuries but believed the plaintiff suffered no pain.” *Ma’ele v. Arrington*, 111 Wash.App. 557, 562, 45 P.3d 557 (2002). The evidence does not support the conclusion that *Fahndrich* suffered no pain or disability as a result of her collisions with *Williams* and *Mullins*. Thus, the trial court abused its discretion in denying her a new trial.

We reverse and remand for a new trial on damages.”

As noted in *Id.* at 308:

“Whether a jury is justified in deciding not to award non-economic damages depends on the evidence presented at trial. See *Palmer v. Jensen*, 132 Wash.2d 193, 201, 937, P.2d 597 (1997). The Court of Appeals ruled: “Here, *Fahndrich* presented extensive evidence of her pain and suffering, and Williams and Mullins (the defendants) presented no evidence to contradict it.”

In complete accord with the rulings of *Palmer* and *Fahndrich*, Ernst Meinhart and Christine Meinhart each submitted substantial, substantive evidence that they were injured, and that those injuries caused them pain for which they sought treatment.

The following are common sense factors in evidence establishing pain and suffering:

- 1) Mr. and Mrs. Meinhart’s testimony, even standing alone, substantiates their respective claims.
- 2) The existence of pain and treatment thereof was corroborated by the testimony of their doctor.
- 3) The force applied to the rear of the Meinhart vehicle corroborates an impact significant to bend a steel bumper.
- 4) The treatment records of both Ernst and Christine Meinhart clearly documented the symptoms of pain and discomfort on a daily treatment basis for 7 months during which time the pain diminished in intensity.
- 5) The defense doctor admitted injury.

- 6) The defense counsel admitted injury.
- 7) The defense doctor testified that treatment was reasonable and necessary through March 5, 2014.
- 8) The jury found that treatment was reasonable and necessary through June 6, 2014.
- 9) On September 1, 2016, during the course of the argument for a new trial the court pointed out to defense counsel “you really didn’t rebut their pain and suffering, you just rebutted the nature and extent of the medical, the time of resolution, and so on, but not that it (the pain and suffering) occurred.”<sup>37</sup>

It should be further noted that the injury diagnoses of both the plaintiff doctor, Finlayson, and defense doctor, Sutton, were the same: Ernst and Christine each suffered sprain and strain type of injuries. **Any disagreement as to whether their injuries were moderate to severe, or only mild to moderate; or as to whether the length of treatment was longer than what it should have been, does not serve to vitiate the existence of pain and suffering for either or both Ernst and Christine, whose claims need to be viewed separately.**

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<sup>37</sup> RP, Motion for New Trial Pg. 8 Line 23 – Pg. 9 Line 1

Despite his comment as noted above, the trial court denied the motion for additur and/or a new trial. It appears that in part, the court noted that he believed the medical specials awarded were less than what they (plaintiffs) proffered.<sup>38</sup> That is not accurate because Christine was awarded 100% of her claimed expenses as itemized in Exhibits 9 and 11. Further, as to Ernst, careful review of the Exhibits 8 and 10 reflect that Ernst received all of his treatment expenses up to and including June 6, 2014, with the single exception of a \$60.00 charge which we submit was most likely the result of an accounting error, particularly given the fact that he was compensated for \$70.00 for treatment on June 6, 2014.<sup>39</sup>

**However, any question of whether Ernst was, or was not, compensated for a claimed exacerbation that occurred in 2015,<sup>40</sup> is simply not relevant to the issue of whether Ernst Meinhart presented substantial evidence that he suffered pain from the accident, which is the issue now before this court; and it certainly does not denigrate**

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<sup>38</sup> RP, Motion for New Trial Pg. 11 Line 25 – Pg. 12 Line 3

<sup>39</sup> Exhibit 8 (M-000005)

<sup>40</sup> During the course of presenting Ernst Meinhart's claim, Dr. Finlayson opined that an exacerbation Ernst suffered in February 2015 was related to the subject motor vehicle accident; whereas Dr. Sutton opined that it was not related. It appears from review of Exhibit 8 that the jury did not award Mr. Meinhart compensation for treatment after June 6, 2014.

**Christine's substantial evidence that she suffered pain as a result of the accident.**

The plaintiffs presented substantial evidence in both oral testimony and documentary form that the plaintiffs, Ernst and Christine Meinhart were each injured in the subject motor vehicle accident. The jury had to have found that each of the plaintiffs were injured for at least three reasons:

- 1) The defense admitted it;
- 2) The defense acknowledged that the treatment from October 30, 2013 through March 5, 2014 was reasonable and necessary; and
- 3) The jury awarded compensation for the treatment given though June 6, 2014, and it would be disingenuous to make such an award if it was not reasonable and necessary under the circumstances.

To emphasize the case authority controlling this appeal we reiterate the 2008 ruling of the *Fahndrich* decision at page 309:

“As in Palmer, Fahndrich is entitled to a new trial because the jury found that the accident caused **injuries** but believe the plaintiff suffered no pain.” (Emphasis added)


Here, the defense openly admitted that both Ernst and Christine Meinhart were injured, for which injuries the jury awarded treatment expenses as being reasonable and necessary.

## VI. CONCLUSION

The trial court's order should be reversed and a new trial granted to both Ernst Meinhart and to Christine Meinhart whether their cases are considered individually, or jointly in light of the evidence.

Respectfully submitted this 2<sup>nd</sup> day of February, 2017.

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
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I hereby certify that I served the Appellants' Opening Brief on:

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BY  DEPUTY

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DATED this 2<sup>nd</sup> day of February, 2017.

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